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1 decision, that the appropriate methodology would be a  
2 reading test. But, again, it really depends on the  
3 nature of the stimuli, what kind of information is in  
4 the stimuli that you are attempting to obtain from  
5 consumers' perceptions are.

6 BY MR. DAUCHER:

7 Q. Just so the record's clear, you understand what  
8 I meant by "high involvement decision"; correct?

9 A. Yes.

10 Q. Can you basically describe that for me?

11 A. It's a decision that usually involves  
12 substantial amount of money and/or substantial amount of  
13 some kind of risk, whether it be physical risk or social  
14 risk or something else. So the respondent is likely to  
15 take more time in making and evaluating it and  
16 responding to it.

17 Q. So you would say that most Internet activity by  
18 consumers is not high involvement under that definition?

19 A. At the search stage, no, it's not.

20 Q. Would you -- what about in viewing the DMV.org  
21 site? Was your assumption that that process for a  
22 visitor would be a high involvement or low involvement  
23 process?

24 A. In my judgement it's a low involvement.

25 Q. Let me show you a document, which we'll have

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1 MR. DAUCHER: That's correct.

2 BY MR. DAUCHER:

3 Q. Did you inquire -- is it your view that that's  
4 a casual decision?

5 MR. MAKOUS: What? Objection. Overbroad.  
6 Vague.

7 BY MR. DAUCHER:

8 Q. The decision to purchase a certain online  
9 traffic school's program?

10 A. I don't know.

11 Q. So you had no information about that when you  
12 determined how to structure your study?

13 A. No, I didn't. But that's one of the reason --  
14 because I didn't know, that's one of the reasons that in  
15 my instructions to the respondents, when they saw the  
16 page that the DMV.org -- the Web page in Study 3, I said  
17 read -- you know, read it, take as much time as you need  
18 to read so as to deal with the issue of that they're not  
19 simply quickly glancing at it. And I've directed them  
20 to read it carefully.

21 Q. So in making that instruction, your assumption  
22 is that someone who really was involved in that process,  
23 someone who had a traffic ticket, would take the time to  
24 read it carefully; correct?

25 A. That's correct, yes.



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1 Q. In this article on page 880, in the second  
2 paragraph, in the second sentence of that paragraph, it  
3 says, "A memory test, on the other hand, is  
4 inappropriate to prove or disprove confusion under  
5 circumstances where consumers exercise care in  
6 purchasing decisions."

7 Do you see that?

8 A. I do.

9 Q. Do you disagree with that?

10 A. As it relates to this study, yes.

11 Q. So even though, in a context of traffic  
12 schools, it's your view that consumers exercise care,  
13 you still feel it's appropriate to conduct a memory  
14 test?

15 A. Because the purpose of this study was to get  
16 their perceptions of this Web site and whose Web site it  
17 was. Again, the purpose of the first question was --  
18 again, we're dealing with Study 3 -- is looking at this,  
19 taking as much time as they want to take to do it, and  
20 then simply to ask them based on that, "What is your  
21 perception?" I don't think that should be a memory  
22 test. I think that should be -- excuse me -- it should  
23 be a memory test. It shouldn't be a reading test.

24 Q. You knew that if you conducted a reading test  
25 in Study 3, that a visitor would be more likely to

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1 notice the disclaimers; correct?

2 A. Yes. That's correct.

3 Q. And so you didn't want to do a reading test,  
4 did you?

5 A. That's not the reason I didn't want to do it.  
6 I wanted to do it because I was looking to measure  
7 consumers' perceptions of the Web site, not to gather  
8 any particular information. And the way -- the only way  
9 you can do a perception study, as opposed to a memory  
10 study, is by taking the stimuli away.

11 Q. You're drawing a distinction now between a  
12 perception study and a memory study?

13 A. They are really the same thing. But, again,  
14 what I was trying to get from them is really  
15 perceptions, not what they remembered, but what was the  
16 net impression that they drew, having looked at this Web  
17 site.

18 Q. And you were okay with doing a reading test as  
19 to the Google search result; correct?

20 A. That's correct.

21 Q. And the reason is because you didn't see an  
22 express disclaimer in the Google search result; correct?

23 A. That's not the reason, no. I simply -- I did  
24 it simply because it provided basic information about a  
25 Web site link or a Web link that didn't provide any kind

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1 traffic school. Secondly, on average they spend at  
2 least two minutes looking at the Web site before making  
3 a purchase decision. Third, on average they see at  
4 least five pages before making the purchase decision.

5 Now, with those assumptions in mind, would --  
6 if those facts were true, would that alter your  
7 understanding of the level of sophistication that a  
8 consumer brings to this purchase decision?

9 MR. MAKOUS: Same objections. And irrelevant  
10 also.

11 THE WITNESS: No, it wouldn't. And I think  
12 that just because someone looks at multiple pages or  
13 multiple Web sites doesn't necessarily make them, A,  
14 sophisticated, or, B, make it a high-involvement  
15 process. Because it is a search process. That's the  
16 beauty of the Internet.

17 BY MR. DAUCHER:

18 Q. And your view is that the Internet is a  
19 low-involvement process?

20 A. I can't say the Internet is a low-involvement  
21 process. It really depends on what the issue is, what  
22 the consumers are focusing on, what kind of risks are  
23 involved, what kind of moneys are involved. All of  
24 those are factors that come into the determination of  
25 level of involvement. It's not -- you can't make a



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1 blanket statement as to the Internet being high- or  
2 low-involvement.

3 Q. But your working assumption in the context of  
4 this case was high- or low-involvement?

5 A. I didn't really have an assumption. But the  
6 intent behind it was, by asking the respondents to take  
7 as much time as they needed to answer the questions,  
8 that it's mimicking a high involvement, that they would  
9 spend the time to look at it carefully.

10 Q. Okay. Now, we've talked about these questions  
11 in Study 2 and 3 that are combined -- 6 and 7, 8 and  
12 9 -- in each study?

13 A. Yes.

14 Q. Did you have any discussions with counsel about  
15 the decision to combine those questions on the same  
16 page?

17 A. No, I did not.

18 Q. Did you ever have a version of the study in  
19 which those questions were separated?

20 A. I don't believe so, no.

21 Q. And those were the only questions, in any of  
22 the four studies, that are combined into one page;  
23 correct?

24 A. To the best of my knowledge, yes.

25 Q. Okay. Now, turning for a moment to the last

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1 study. In this study, the fourth study, although  
2 it's -- it's under Exhibit G to your declaration -- you  
3 were seeking to determine what?

4 A. I'm sorry. What is your question?

5 Q. What were you seeking to establish by this  
6 study?

7 A. Simply which factors, if any -- as indicated in  
8 Question 2, which factors, if any, would be important to  
9 a respondent in a decision as to which traffic school  
10 course to use.

11 Q. Now, in selecting these possible factors, what  
12 information did you rely on?

13 A. I didn't rely on anyone. I just seemed to say,  
14 "Here's some factors that seem to be possibilities or  
15 factors that come into play."

16 Q. So, basically, you thought of these yourself?

17 A. That's correct, yes.

18 Q. And did anyone else provide input to that  
19 process?

20 A. Not that I recall.

21 Q. I take it you did run a version of Question 2  
22 on this fourth study by counsel; correct?

23 A. Yes, I did.

24 Q. Were any changes made as a result of that  
25 review?

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1           A.    I don't believe so. Unless, perhaps --  
2           although, I probably corrected before -- the "offer  
3           online programs," the fact that in one of the other  
4           studies, I had put a hyphen in there. But other than  
5           that, I don't recall any changes being made. And  
6           certainly none by counsel. No recommendation by  
7           counsel.

8           Q.    And you provided a total of eight possible  
9           answers to Question 2; correct?

10          A.    In Question 2 that's correct, yes, eight. And  
11          then Question 3, of course, is an open-ended, "Any other  
12          factors in your decision?"

13          Q.    And why did you not just ask an open-ended  
14          question for 2?

15               MR. MAKOUS: Objection. Vague.

16               THE WITNESS: It -- it just seemed that -- that  
17          it was the kind of thing that would lend itself more  
18          easily to a closed-end question, a "select all that  
19          apply" question, particularly since the question says,  
20          "Which of the following, if any, would be important," so  
21          that, in effect, they had the option of saying "none."

22               (Mr. Creditor leaves the proceedings.)

23          BY MR. DAUCHER:

24          Q.    But in response to each -- the way you set this  
25          up, first of all, "recommended by DMV" was always

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1 BY MR. DAUCHER:

2 Q. That's the factor that you thought would help  
3 the plaintiffs establish materiality in this case;  
4 correct?

5 A. To the extent that respondents said "yes," that  
6 was important. I believe it does establish -- or help  
7 establish materiality.

8 Q. Now, in setting up this study, you forced every  
9 respondent to answer "yes," "no," or "don't know" to  
10 each factor; correct?

11 MR. MAKOUS: Objection. "Forced" is  
12 argumentative.

13 THE WITNESS: I'm sorry. By force them, I gave  
14 them those three options. I didn't force them to give  
15 any answers because it wasn't mandatory. They didn't  
16 have to answer any of these because the question says,  
17 "Which of the following, if any, would be important to  
18 you?" So a respondent wasn't forced to answer any of  
19 them. They could have simply skipped out of all of it  
20 or said some are important or left some of them blank.

21 BY MR. DAUCHER:

22 Q. Is it then coincidence that we have 374  
23 responses to each of the eight questions?

24 MR. MAKOUS: You mean each of the eight  
25 categories?

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1 MR. DAUCHER: Yeah. Each of the eight options.

2 THE WITNESS: Is it coincidental?

3 BY MR. DAUCHER:

4 Q. Yes.

5 A. That simply says that the respondents consider  
6 these factors to have some relevance to them. And so  
7 they were able -- so they felt appropriate to answer for  
8 each of them. They didn't all say "important" clearly.

9 Q. And 374 correspond exactly to the number of  
10 qualified respondents to Question 2; correct?

11 You should keep the results side by side.

12 A. So 374 people answered that question "yes."

13 Q. Answered Question 1 "yes." And --

14 A. That's correct.

15 Q. And based upon that, were sent along to

16 Question 2?

17 A. That's correct.

18 Q. And if you didn't answer Question 1 "yes," then  
19 you were not sent along to more questions?

20 A. That's correct.

21 Q. Okay.

22 A. You were sent along to the -- you were sent  
23 simply to the demographics.

24 Q. Okay. Now, do you know whether the DMV  
25 approves online traffic schools in California?

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1 A. Very rarely I had one actually from California.  
2 No. They're not Californians.

3 Q. Apart from asking those two questions, whether  
4 they'd been to traffic school, and if so, how did they  
5 locate that -- or how would they -- how would they go  
6 about locating it?

7 A. That's correct.

8 Q. Did you ask them what factors would be  
9 important to them in selecting a traffic school?

10 A. No, I did not.

11 Q. Why not?

12 A. It wasn't -- when I was asking that question, I  
13 wasn't focusing on study No. 4. I was really focusing  
14 on studies No. 2 and 3.

15 Q. So -- okay.

16 A. Just to get a better -- I'm trying to get a  
17 better understanding of the mind-set of the  
18 respondent -- of people who are in the -- at least  
19 partially in the target market for traffic schools.

20 Q. So this discussion with your class had nothing  
21 to do with Survey 4?

22 A. That's correct.

23 Q. You've been a teacher for how long?

24 A. A long time.

25 Q. Ten years?



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1 A. Oh, no. No. About 30 years, 25 years.

2 Q. You have a pretty good insight, I suspect, into  
3 the mind-set of college-age students; correct?

4 A. I'm not sure anybody has that, but certainly I  
5 have had a lot of experience with college students.

6 Q. Now, based upon that experience, wouldn't you  
7 say that if I, a college student, faces a ticket, then  
8 their goal is to get out of that ticket as cheaply and  
9 quickly as possible?

10 A. Typically, that would be the way that they  
11 would do it. You know, what -- you know, what's it  
12 going to cost me? How long until I can get it behind  
13 me?

14 Q. And so long as that -- if that involved traffic  
15 school, isn't it true -- wouldn't it be reasonable to  
16 say, with that mind-set in mind, that the only thing  
17 they would care about, with respect to the state, was  
18 whether the state would accept their having gone to a  
19 particular program?

20 MR. MAKOUS: Objection. Speculative. Lacks  
21 foundation.

22 THE WITNESS: I can't speculate what would be  
23 the factors important to them.

24 BY MR. DAUCHER:

25 Q. Beyond -- okay. The words "recommended by the



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1 DMV" -- what did you mean by that?

2 A. Just the words themselves?

3 Q. Well, did you mean to imply that that meant  
4 that the DMV would accept that schoolwork as in  
5 compliance with their traffic dismissal --

6 MR. MAKOUS: Schoolwork?

7 BY MR. DAUCHER:

8 Q. -- program.

9 MR. DAUCHER: Can you let me finish my  
10 question?

11 MR. MAKOUS: Okay. Sorry. Schoolwork?

12 MR. DAUCHER: Course work. Schoolwork.

13 MR. MAKOUS: What's schoolwork have to do with  
14 traffic courses?

15 MR. DAUCHER: You know what? If you can let me  
16 finish my question, we can get done.

17 MR. MAKOUS: Go ahead. Go ahead. Go ahead.

18 MR. DAUCHER: Then it's all over.

19 MR. MAKOUS: I'll withdraw my comments. Go  
20 ahead. I'm sorry. Ask your question.

21 BY MR. DAUCHER:

22 Q. In using the phrase "recommended by the DMV,"  
23 did you mean to imply that the DMV would accept that  
24 traffic school's course work in satisfaction of their  
25 requirements?

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1 MR. MAKOUS: Objection. Irrelevant.  
2 Speculative. Lacks foundation.

3 THE WITNESS: I don't recall having -- you  
4 know, having spent any great deal of time thinking about  
5 that. It's just that the implication is that if this is  
6 recommended by the DMV, then it would serve to remove  
7 the points, or whatever. That's the intent behind it.

8 BY MR. DAUCHER:

9 Q. Yeah. The primary point of "recommended by the  
10 DMV" is to ensure that it would serve to remove the  
11 points as you've said; correct?

12 A. That would --

13 MR. MAKOUS: Same objections.

14 THE WITNESS: That's -- as I think about it  
15 now, that's really the direction I was looking at.

16 BY MR. DAUCHER:

17 Q. And it's also fair to say, isn't it, that if  
18 there were two courses, both of which would serve to  
19 remove the points, but one of which -- only one of which  
20 was, quote, "recommended by the DMV," unquote, then that  
21 additional incremental recommendation was not what you  
22 were after in this survey?

23 A. I'm sorry. I don't understand what you were  
24 just asking me.

25 Q. You understand the concept that -- well, you



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1 reflects reality in perception studies."

2 And further down --

3 Q. Wait. Just stop right there.

4 So in a perception study that you conducted,  
5 the reality is that respondents are guessing in your  
6 view?

7 MR. MAKOUS: Objection. Mischaracterizes his  
8 testimony.

9 BY MR. DAUCHER:

10 Q. That's what you wrote, isn't it?

11 A. No. I didn't say that. I said it reflects --  
12 guessing reflects reality; that some respondents, some  
13 people, when looking at an ad, they're looking at it and  
14 they're making a judgment as to what they perceive from  
15 it.

16 And they can say, "Yes. This is what I know it  
17 to believe or what I think it is." That's why the  
18 reality is that in a perception study, consumers are  
19 going to -- some consumers may, in fact, guess. But  
20 that reflects the reality as they see it.

21 Q. And you made no effort in your study to trim  
22 out that subpart of responses, namely, those viewers who  
23 were just guessing basically?

24 A. No. I wouldn't want to. Because, quite  
25 frankly, they are part of the market. People whose --



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1 if they guess that this is a particular Web site,  
2 belongs to someone, then that is the reality as far as  
3 they're concerned. And their reactions -- and their  
4 actions are going to be based on that.

5 Q. Sometimes a guess can be induced by a question;  
6 correct?

7 MR. MAKOUS: Objection. Overbroad.

8 BY MR. DAUCHER:

9 Q. In the context of surveys; right?

10 MR. MAKOUS: Vague.

11 THE WITNESS: Yes, it can.

12 BY MR. DAUCHER:

13 Q. And sometimes, when you ask a question that  
14 induces a guess, what you're really doing is bringing up  
15 a topic that the visitor has not contemplated; correct?

16 MR. MAKOUS: Objection. Overbroad. Vague.  
17 Incomplete hypothetical.

18 THE WITNESS: Yes. That's true. And that's  
19 one of the reasons why, when you're asking those kinds  
20 of questions, you ask the screener question, like I did  
21 in 6, for example, in one of the -- in both the studies,  
22 Studies 2 and 3.

23 I'm asking whether, "Is this endorsed by a  
24 government agency," in Question 6. So I'm asking  
25 whether that is something that they thought about, or

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1 A. Relates to paragraph 49.

2 Q. And now this covers Survey 3, to be clear?

3 A. Yes.

4 Q. Okay.

5 A. His comment, "They were then presented with  
6 part of the Web page, excluding pertinent disclaimers  
7 that appear at the bottom of the page." And then he  
8 quotes what I said.

9 And my annotation is, quote, "Consumers don't  
10 read footnote disclaimers. Material below not related  
11 to traffic schools."

12 And that was -- goes back to my experience at  
13 the FTC and all the studies that I've done that  
14 consumers simply don't read footnote disclaimers.

15 Q. Now, when we go to pull the record in the  
16 U-Haul case, are we going to find that U-Haul had some  
17 footnote disclaimers?

18 A. I don't believe so. I don't recall.

19 Q. You wouldn't have testified differently in the  
20 U-Haul case than you would here about footnote  
21 disclaimers; right?

22 A. No, I wouldn't.

23 Q. So based upon your view that consumers don't  
24 read footnotes, you decided not to even put that before  
25 the viewer of Survey 3; correct?

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1           A.     That wasn't the reason. The reason that I did  
2     it was for two reasons: No. 1, there is a disclaimer on  
3     the top of the page, on the DMV.org Web page, that they  
4     viewed. There was a disclaimer there. And based on the  
5     studies I have done and watching consumers, the material  
6     after the traffic school dealt with other issues, such  
7     as insurance and whatever. And I believe they would  
8     then -- that they'd see that, and they'd say, "Okay.  
9     I'm going to make a decision and go forward."

10          Q.     Okay. You built those assumptions into your  
11     test. That's all I want to know.

12          A.     That's correct, yes.

13          Q.     Okay.

14                 MR. MAKOUS: Counselor, can I take a bathroom  
15     break real quick.

16                 MR. DAUCHER: Sure.

17                 (A break was taken.)

18                 (Mr. Creditor leaves the proceedings.)

19     BY MR. DAUCHER:

20          Q.     Okay. So what's the comment we were -- the  
21     next comment?

22          A.     Okay. My comment -- my annotation is, first of  
23     all, they don't read footnote disclaimers.

24                 Secondly, DMV.org was on the first page of  
25     the -- of Google. This is it, I guess. "Study 1,"



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1 Q. But you would agree that if what we are after  
2 in this case is to determine who is misled into  
3 purchasing a traffic school service online by the use of  
4 the DMV.org domain name, your survey does not get at  
5 that question; correct?

6 A. No. I don't agree at all. Not at all.  
7 Because in response to the open-ended question in both  
8 studies -- in Question 5 in both Study 2 and Study 3,  
9 57 percent of the people, when asked an unbiased,  
10 open-ended question, "Whose Web site is this," their  
11 response, unaided by anything I said to them or any cues  
12 I gave them, was Department of Motor Vehicles.

13 Q. But you just said that an Internet user who  
14 has a traffic ticket -- remember him? Got a ticket --  
15 right -- is going to hunt around on a variety of sites  
16 before making a decision; correct?

17 A. They are likely to, yes.

18 Q. And that may even mean visiting the DMV.org  
19 path multiple times; correct?

20 MR. MAKOUS: Objection. Speculative.

21 THE WITNESS: I don't know whether they would  
22 do it more than one time. They may -- they may not --  
23 they may not -- again, I'm speculating. I have no  
24 idea -- but they may get -- have looked at some and get  
25 to that site and say, "Gee, this is the one. That is



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1 the Department of Motor Vehicles Web site. So that's  
2 the one I'm going to go with."

3 So depending on where they started, whether  
4 they started with someone else and got to them or  
5 whether they got to them, clearly based on Study 2 and,  
6 more importantly, Study 3, 57 percent, substantial  
7 majority of the respondents, said that it was the --  
8 their perception was that that Web site was the  
9 Department of Motor Vehicles.

10 BY MR. DAUCHER:

11 Q. But you testified that when it comes down to  
12 the point where they're going to make a decision,  
13 they're going to be more careful; correct?

14 A. Yes.

15 Q. And your thesis is, though, based on the work  
16 you've done, that that DMV.org name is likely to mislead  
17 people into buying traffic school courses. Is that -- I  
18 mean, I don't see that conclusion in your survey  
19 anywhere. You've not given that opinion; correct?

20 A. I'm not sure what you just asked me.

21 Q. Okay. Well --

22 A. I'm sorry.

23 Q. Your opinions are in your reports; so -- let me  
24 ask you this way.

25 MR. MAKOUS: Objection.



1 STATE OF CALIFORNIA  
2 COUNTY OF LOS ANGELES

}  
} ss.  
}

3  
4 I, Rafael Herrera , hereby certify:

5 I am an employee of Barkley Court Reporters,  
6 duly authorized agent for the deposition officer that  
7 stenographically recorded the testimony in the foregoing  
8 proceeding and authorized to execute this copy  
9 certificate.

10 The foregoing is a true and correct copy of  
11 the original transcript of the stated proceeding.  
12

13 Dated 8/24/07.

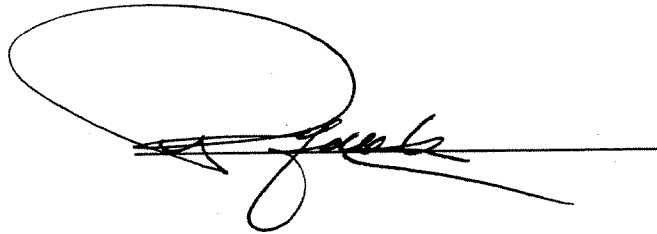
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